Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1842

D. J. McDUFFIE, INC., ET AL

Petitioners

VERSUS

OLD RELIABLE FIRE INSURANCE COMPANY, ET AL

Respondents

RESPONSE OF OLD RELIABLE FIRE INSURANCE COMPANY, ET AL, TO THE PETITION OF D. J. McDUFFIE, INC., AND WARD DRILLING CO., INC. FOR A WRIT OF CERTIOTARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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REASONS FOR DENYING THE WRIT

A. THE REAL CASE HERE IS ONE OF FACT ON WHICH TWO COURTS HAVE PASSED AND IS ONE WHICH DOES NOT INVOLVE ANY GENUINE OR SERIOUS CONTROVERSY OF LAW.

The petition for a writ in this case bears little recognizable relationship or resemblance to the actual case tried in the lower courts. What the actual case really is may quickly be appraised by reference to the findings of fact of the two lower courts: the trial court, which heard every single witness in person 1/

1/ Pages 11, seq., of the Appendix to the petition.

and the Court of Appeals for the Fifth Circuit. 2/

The District Court's opinion, rendered, as has been said, after that court's having heard every single witness in person, minutely reviewed all the testimony. It will show beyond peradventure that the insured drilling barge, Ward No. 15, was thirty-two years old, remodeled to a drilling barge some seventeen years before her demise, already in a "critically sinking condition" thirteen years before her demise, and for months before the sinking, in a holed, wasted, badly deteriorated state, capable of being kept afloat only by constant pumping. Reiterated recommendations of her own surveyors for repair were ignored.

Her real condition is shown by the opinion of the District Court 3/ and by that of the Court of Appeals, 4/ and was a condition of "general dilapidation, " "not reasonably well suited for the purposes of its intended use," "in a condition of serious deterioration." The sinking resulted from these circumstances, "rather than from some extraordinary and perilous forces of the sea." 5/

This is a textbook marine insurance case of loss by deterioration, dilapidation, decay, and "spectacular unseaworthiness" rather than from any peril against which the underwriters undertook to insure the petitioners. Both lower courts have so found and so held.

In its attempt to bring this case to the attention of this Honorable Court, petitioner relies on two theories of "law": one, an utter triviality, and the other a readily recognizable irrelevance.

2/ Original opinion, December 11, 1979, pages A - 5, et seq., and per curiam denial of petition for rehearing and for rehearing en banc, pages A - 2, et seq.

3/ A - 34

4/ A - 8

5/ A - 36

B. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE REMOVAL QUESTION. THE INJECTION OF THAT QUESTION HERE IS AT THE MOST A TRIVIALITY.

The petition for removal [6] stated the domiciles of the three defendants, and recited, in the words of the statute, that, as to each defendant, the amount in controversy exceeded the sum of $10,000 exclusive of interest and cost, and that the controversy was "between citizens of different states," so that District Court had jurisdiction pursuant to Title 28, § 1332. It its original petition (complaint) in the Louisiana State Court [7] the plaintiff, McDuffie, had alleged itself to be a Louisiana corporation and the defendants to be "foreign" corporations licensed to do business in Louisiana.

The allegations of the original petition (complaint) with those of the petition for removal, constituted full compliance with the removal statute. The petition for removal was timely filed.

After the time for removal had elapsed, petitioner, McDuffie, moved in the District Court to remand, relying on a series of district court decisions holding that a petition for removal had to show not only that the action was between citizens of different states but also that that was true "now and at the time when this action was brought." The motion to remand was denied, and the motion to amend the petition for removal was granted. [8]

The petition here, as an asserted reason for granting the

6/ A - 48
7/ A - 40
8/ A - 46

writ 9/, says that the ruling on this point below is "CONTRARY TO THE RULINGS OF THE DISTRICT COURTS IN OTHER CIRCUITS . . . . ", and then goes on to cite several cases "in other districts. ' 10/ Then it ends with the remarkable and wholly unjustified statement that writ should be granted "to remove the conflict between the circuits." The significant differences between those two statements is noteworthy.

There is no conflict between the circuits, and any argument that this non-existent "conflict" justifies a writ is without merit.

Curiously enough, Ward's suit was not in the district court by removal; McDuffie's was. Ward, who is now the only party at interest, came into the district court *after* Ward had bought out Mc Duffie, then making itself party plaintiff, on the verge of trial, long after remand had been denied to McDuffie. This only points up the lack of substance to Ward's now relying on this purported jurisdictional question, see Appendix to Petition, page A-12.

Relying upon Rule 15(a) of the Federal Rules of Civil Procedure, which mandates that leave to amend pleadings shall be freely given when justice so requires; and on 28 U.S.S. § 1653, that "defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts," the Fifth Circuit has allowed the amendment of "defective allegations" of diversity jurisdiction, ***Fireman's Insurance Company of Newark, New Jersey v. Robbins Coal Company***, 288 F.2d 349 (5th Cir. 1961); ***American Motorists Insurance Co. v. American Employers' Insurance Co.***, 608 F.2d 624 (5th Cir. 1979).

9/ Petition - 15
10/ Petition - 17, 18

No circuit differs, and the Tenth Circuit, in *Hendrix v. New Amsterdam Casualty Company*, 390 F.2d 299 (10th Cir. 1968), has commented on the obvious lack of substance in the precise position which petitioner is taking here, that it is too "grudging to the controlling statute," "too prone to equate imperfect allegations of jurisdiction with total absence of jurisdictional foundations" and could tend to "exalt form over substance, and legal flaw-picking over the orderly disposition of cases properly submitted to Federal Courts."

If there was a defective allegation of jurisdiction in the removal petition, which is not for one moment admitted, it was properly curable by amendment.

The statement that there is a conflict between circuits is baseless, and the urging of the subject before this Court is reliance upon a triviality.

C. THIS CASE DOES NOT INVOLVE ANY PROBLEM OF THE WILBURN BOAT CASE: THAT CASE IS IRRELEVANT TO THIS ONE.

The effort to suggest that the decision of this case by the courts below somehow violates the principle of *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310 (1955) is equally without merit. That case involved the question of whether express warranties in a marine policy require literal compliance. The policy there warranted (a) that the boat would not be pledged; and (b) could be used solely for private pleasure purposes. Both of these express warranties were breached. The loss of the boat was by fire. Under the statutes of Texas, the policy provision against pledging might have been wholly invalid; and breach of the provisions of a "fire" policy [the policy was a marine policy, but the loss was by fire] was a defense only if the breach contributed to the loss. The court held that there was no judicially established admiralty rule governing those particular warranties,

and the court declined to fashion "judicially" such a rule, but held that the court, instead, would look to the law of the state. In that case, the state law specifically outlawed reliance on the warranties, because the breach obviously had no causal connection whatsoever with the loss. 11/

There is not a syllable of Louisiana law, statutory or otherwise, bearing on the question involved in this case. The Louisiana statutes quoted at some length in the petition 12/ can readily be seen to have absolutely nothing to do with this case.

L.S.A. - R.S. 22:619, Section A, has to do only with oral or written misrepresentation or warranty "made in the negotiation of an insurance contract," a provision of not the slightest relevance here. Section B of the same section refers only to life, health and accident insurance and not to marine insurance. Section 692 13/ applies to fire insurance and not marine insurance.

In fact, petitioner's rather random quotations from the Louisiana Insurance Code are so abviously irrelevant to this case that they can serve no purpose except confusion, and there seems no reason to belabor them.

The suggestion that *Wilburn* somehow was germane to this case caused the Fifth Circuit, on the petition for rehearing,

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11/ **Incidentally, on remand, the policy was held void on the ground of misrepresentation and failure to disclose, see *Fireman's Fund Insurance Co. v. Wilburn Boat Co.*, 300 F.2d 631 (5th Cir. 1962).**

12/ **Pages 8 -12.**

13/ **Petition, Page 10**

very properly to insert a footnote explaining its position that *Wilburn Boat* did not prevent its making the appropriate holding in this case with reference to established federal maritime rules governing the elementary warranty of seaworthiness. 14/

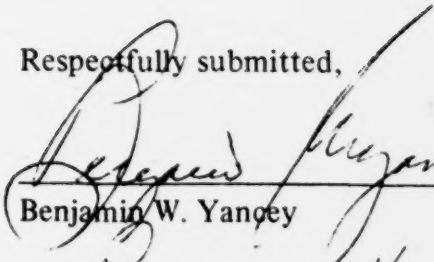
Equally significant is the petitioner's doggedly ignoring the important, alternative grounds of the decision: the plaintiff's complete inability to prove that the rig had been lost by a peril insured; but, entirely without regard to the warranty, the loss plainly resulted from the holed, wasted, badly deteriorated state of the vessel, in so dilapidated a condition that she only be kept afloat by constant pumping.

It is submitted that this case does not justify a writ. 15/

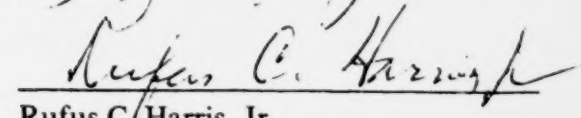
14/ A - 3 - 4

15/ **One of the defendants, Reserve Insurance Company, is in liquidation in the Illinois state court, with an outstanding injunction against the pursuing of claim against Reserve except in those proceedings. Just prior to the hearing in the Fifth Circuit, Reserve, on the basis of this injunction, moved to stay proceedings against it. The petition, page 15, state that the Fifth Circuit denied this motion. We do not understand that to be correct. The Fifth Circuit took the motion with the case, and, having affirmed, the motion to stay on behalf of Reserve became moot. The same situation obtains here. Denial of the writ would make moot the motion to stay.**

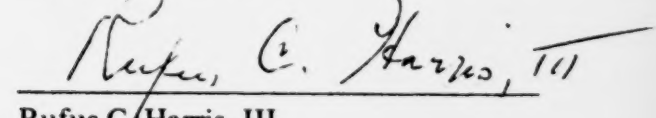
Respectfully submitted,



Benjamin W. Yancey



Rufus C. Harris, Jr.



Rufus C. Harris, III

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been mailed, postage prepaid, to counsel for petitioners, Neal D. Hobson, Esq., and Joseph W. Looney, Esq., Milling, Benson, Woodward, Hillyer, Pierson & Miller, 1100 Whitney Building, New Orleans, Louisiana 70130, and Michael E. Wanek, Esq., Hulse, Nelson & Wanek, One Canal Place, New Orleans, Louisiana 70130, this 17th day of June, 1980.

Benjamin W. Yancey